UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

(Stockton, CA)

SJH HOLDINGS, INC. d/b/a
ST. JOSEPH'S COMMUNITY HOME CARE

Employer[1]

and Case 32-RC-5573

SEIU UNITED HEALTHCARE
WORKERS-WEST

Petitioner

DECISION AND ORDER

SJH Holdings, Inc. d/b/a St. Joseph's Community Home Care, herein called the Employer, is engaged in the business of providing home healthcare services by licensed vocational nurses and home healthcare aides. SEIU United Healthcare Workers-West, herein called the Petitioner, filed a petition and an amended petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all full-time and regular part-time non-professional employees, including licensed vocational nurses and home healthcare aides employed by the Employer at its Stockton, California facility, excluding all professional employees, managers, confidential employees, employees currently represented by a union, guards, and supervisors as defined by the Act.

[1] The name of the Employer appears as amended at the hearing.

On August 8, 2008, a hearing officer of the Board held a hearing. Both parties participated in the hearing and the Employer filed a brief with me, which I have duly considered.[2] There is no dispute as to the appropriateness of the petitioned-for unit. The only issue before me is whether it remains appropriate to direct an election notwithstanding that the Board of Directors of the Employer has passed a resolution calling for the closure of the Employer's home care agency no later than September 30, 2008, including the termination of all employees that would otherwise be contained within the petitioned-for unit.

The Employer argues that it would not effectuate the policies of the Act to direct an election given the imminent closure of the business. The Employer asserts that it has experienced serious financial difficulties, including operating at a loss, over the last several fiscal years, and that it has now reached the point at which it must cease to operate given recent cuts in State of California Medi-Cal funding which took effect on July 1, 2008. Conversely, Petitioner argues that an election should be directed in any event, as the Union, if it prevails, can participate in effects bargaining with the Employer regarding the impact on employees of the closure of the business, including the issue of transfer rights to other facilities operated by the Employer's parent corporation.

[2] Although it did not file a brief, Petitioner timely submitted an August 18, 2008 letter in which it argued for the direction of an election in this matter, and it attached a document Petitioner described as "Appendix A from the current agreement between Petitioner and Catholic Healthcare West" (the Employer's parent corporation). Appendix A appears to be what is commonly referred to as a neutrality agreement. While I have reviewed and considered the arguments made in Petitioner's letter, I have not considered and do not rely upon the attached neutrality agreement. No party moved for its inclusion in the record, noted an intent to seek its inclusion in the record, or elicited testimony regarding its authenticity or applicability to the present case. Thus, even if it were otherwise admissible, it is by no means clear that a neutrality agreement between Petitioner and Catholic Healthcare West has any relevance to the present matter in which the employer named in the petition is St. Joseph's Community Home Care.

I have considered the evidence and the arguments presented by the parties on these issues and, as discussed below, I conclude that it would serve no useful purpose under the Act to conduct an election since the immenient closure of the Employer's operation appears to be certain, definite and not speculative. Accordingly, I have determined that the petition must be dismissed.

BACKGROUND

The Employer has been in business since 1985. SJH Holdings, Inc. does not currently own or control any facility or entity other than the St. Joseph's Community Home Care entity at issue in this case. The Employer is a for-profit California corporation, and a wholly owned subsidiary of Catholic Healthcare West, a California non-profit corporation. The Employer has a five person Board of Directors, and it employs approximately 71 employees, including home health care aides who earn approximately $8.75 to $9.25 per hour, and licensed vocational nurses (LVN's) who earn approximately $16 per hour.

The Employer's fiscal year runs from July 1 through June 30. Each year, the Employer depends upon Medi-Cal reimbursements for 75% of its income and billings. The Employer introduced evidence not contradicted by Petitioner that the Employer has diligently sought to expand the 25% of its income that comes from sources other than Medi-Cal reimbursements (i.e., private pay, commercial insurance business), but that it has not succeeded in doing so. The Employer also introduced evidence that about three years ago its parent corporation and/or Board of Directors mandated that the Employer needed to at least break even rather than operate at a substantial monetary loss each year.

Until recently, the Employer had been under the impression that it was making progress in this regard. For example, the Employer went from a loss of $137,000 in fiscal year 2006 to a loss of only $8,000 in fiscal year 2007. Accordingly, as recently as June 2008, the Employer was under the impression that it would realize a profit of approximately $33,000 for fiscal year 2008. However, when the Employer's accounting books were finalized after June 30, 2008, the Employer realized that it had accrued an approximate $12,000 loss rather than a $33,000 profit.

In addition, in February 2008, the California legislature enacted AB 5, an emergency measure the effect of which was to cut Medi-Cal reimbursement funds by ten percent effective July 1, 2008.[3] In light of the ten percent Medi-Cal cut, the Employer asked its financial analysts to prepare a projection of the impact of the cut on the Employer's budget for the fiscal year 2009. Pursuant to that projection, not contradicted by the Petitioner, the Employer concluded that what it originally expected to be a $12,000 loss for fiscal year 2009 would instead be a $168,000 loss for fiscal year 2009, as a direct result of the Medi-Cal reimbursement cuts. The Employer ruled out cutting costs as a way of making up for the loss of Medi-Cal reimbursements because 97% of the Employer's total expenses are comprised of wages and benefits, and the Employer is already at the low end of the wage scale for these types of employees in the greater Stockton area. Thus, it concluded that any reduction in wages would not be viable

[3] A number of hospitals and medical trade organizations attempted to obtain a preliminary injunction against the implementation of AB 5, but a California Superior Court for the County of Los Angeles denied the request for an injunction in an order dated July 29, 2008. Furthermore, as of the August 8, 2008 date of the hearing in this matter, the State of California had not yet passed a budget for the fiscal year which began July 1, 2008 and which will end on June 30, 2009. Because of this budget impasse, the State of California has imposed a hold on all Medi-Cal reimbursements, even those reflecting the 10% reduced amounts under AB 5.

because it would lead to the departure of personnel whom the Employer has historically had a difficult time recruiting.

On August 12, 2008, after the hearing in this matter, the Board of Directors of the Employer met in a special session to consider a proposal that the Employer close its home care business within the next 60 days. At this meeting of the Board of Directors, after discussion and deliberation, the Board passed a unanimous resolution resolving that the Employer's home care operations cease and that all aspects of its business be wound up.[4] The resolution gave the officers of the Employer the power and authority to terminate and wind up the home care business as soon as possible and in any event no later than September 30, 2008 (approximately seven weeks after the hearing in this matter). The resolution also called for the furnishing of state and federal WARN Act notices to all its employees on August 13, 2008, informing them that their termination will be effective no later than September 30, 2008. The resolution also provides certain severance benefits to affected employees, and it anticipates that a small group of no more than three non-bargaining unit employees will continue to be employed for a short period for the sole purpose of collecting the Employer's remaining accounts receivable and paying its remaining debts. There is no evidence in the present record that the Employer has any intent other than to act in full accordance with this Board of Directors resolution in the future.

[4] On August 13, 2008, the Employer submitted to the Region a request that the minutes of the August 12, 2008 Board of Directors meeting and the accompanying Board of Directors resolution be made part of the record in this case. A copy of said written request was served upon counsel for Petitioner. There having been no objection from any party at or after the hearing, and Petitioner having consented in advance to the submission by the Employer of such a late-filed exhibit, I hereby receive into the record the minutes of the August 12, 2008 Board of Directors meeting and the Board of Directors resolution, which I have duly considered in reaching my decision herein.

ANALYSIS

In a long line of cases, the Board has consistently held that it will not conduct an election at a time when a permanent layoff is imminent and certain. See *Hughes Aircraft Company*, 308 NLRB 82 (1992); *Concourse Village, Inc.*, 276 NLRB 12 (1985); *Martin Marietta Aluminum, Inc.*, 214 NLRB 646 (1974); *M.B. Kahn Construction Co., Inc.*, 210 NLRB 1050 (1974); *Davy McKee Corporation*, 308 NLRB 839 (1992). In *Larson Plywood Company*, 223 NLRB 1161 (1976), the Board decided that a corporate resolution to sell the company assets within 90 days constituted an imminent and certain decision. In *Hughes Aircraft*, supra, the Board found a sufficiently imminent and certain basis for refraining from directing an election when the employer notified employees of their layoffs on June 5, 1992 with such layoffs to take effect between August 3 and August 16, 1992, approximately two months later. In *Davy McKee Corporation*, the Board noted "numerous Board decisions establishing that where an employer's operations are scheduled to terminate within 3 to 4 months that no useful purpose is served by directing an election." 308 NLRB at 839 (citing *General Motors Corp.*, 88 NLRB 119 (1950); *Todd-Galveston Dry Docks*, 54 NLRB 625 (1944); *Fraser-Brace Engineering Co.*, 38 NLRB 1263 (1942); and *Fruco Construction Co.*, 38 NLRB 991 (1942)).

I find this line of cases to be controlling under the circumstances of this case.[5] While the Petitioner may subjectively believe or hope that there remains sufficient time

[5] I find inapposite those cases in which elections were directed because the closure of operations was speculative and/or the anticipated closure was to occur farther into the future than the approximate 45 day period in this case. See, e.g., *Fish Engineering & Construction Partners, Ltd.*, 308 NLRB 836 (1992); *Norfolk Maintenance Corporation*, 310 NLRB 527 (1993); *E.I. du Pont & Co.*, 117 NLRB 1048 (1957).

in which to engage in effects bargaining should Petitioner prevail in an election, Petitioner has pointed to no contrary Board or other case authority in which a time period as short as that which exists between the hearing and the anticipated closure date here has been found sufficient to permit meaningful effects bargaining.

With respect to the Employer's financial condition, Petitioner elicited evidence that the Employer is only 75% rather than entirely dependent upon Medi-Cal funding for its existence. Nonetheless, the Employer established that it was already operating at a loss prior to the implementation of the July 2008 state budget cuts and it has decided to close down its operations by September 30, 2008. Petitioner did not adduce any evidence of action on the part of the Employer inconsistent with its stated intent to close as confirmed in the August 12, 2008 resolution of the Employer's Board of Directors. Nor is there any evidence in the record that the employment relationship of the potential bargaining unit employees will survive the liquidation.

In these circumstances, where the imminent closure of the Employer's operations appears to be certain, definite and not speculative, I conclude that it would serve no useful purpose under the Act to conduct an election at this time. I shall, therefore, dismiss the petition in this matter. However, should the Employer rescind its August 12, 2008 resolution or not in fact proceed with its plans to liquidate the business by no later than September 30, 2008, I will entertain a motion by the Petitioner to reinstate the amended petition.

CONCLUSIONS AND FINDINGS

Based on the entire record in this matter and in accordance with the discussion above, I am dismissing the amended petition:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated, and I find, that the Petitioner Union is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petitioner claims to represent certain employees of the Employer.

5. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

ORDER

The amended petition in this matter is dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, D.C. by 5 p.m., EST on **September 3, 2008**. The request may be filed electronically through the Agency's website, www.nlrb.gov,[6] but may **not** be filed by facsimile.

Dated at Oakland California this 19th day of August, 2008.

/s/ Alan B. Reichard
Alan B. Reichard
Regional Director
National Labor Relations Board
Region 32

32-1342

[6] To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-file page opens, go to the heading **Board/Office of the Executive Secretary** and click on the "File Documents" button under that heading. A page then appears describing the E-filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's website, www.nlrb.gov.